



Australian Government

Takeovers Panel

**Reasons for Decision
Alto Metals Limited
[2020] ATP 17**

Catchwords:

Entitlement issue – frustrating action – defensive action – effect on control – efficient, competitive and informed market – automatic price variation rule – undervalue statement – information deficiencies – directors’ recommendation – target’s statement – shareholder intention statements – lock-up – declaration – orders – interim order

Corporations Act 2001 (Cth), sections 602, 611 (item 9), 621(3), 651A, 657A, 657D

Re VGM Holdings Ltd [1942] 1 All ER 224

Guidance Note 4: Remedies General – Guidance Note 7: Lock-up devices – Guidance Note 12: Frustrating Action – Guidance Note 17: Rights Issues – Guidance Note 22: Recommendations and Undervalue Statements – Guidance Note 23: Shareholder intention statements

Freshtel Holdings Limited [2016] ATP 15, Gondwana Resources Limited [2014] ATP 9, Tully Sugar Limited [2009] ATP 26, Babcock & Brown Communities Group [2008] ATP 25, Programmed Maintenance Services Limited 02 [2008] ATP 9, Skywest Limited [2004] ATP 10

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
YES	NO	YES	YES	YES	NO

INTRODUCTION

1. The Panel, Kelvin Barry, Paula Dwyer (sitting President) and Rory Moriarty, made a declaration of unacceptable circumstances in relation to the affairs of Alto Metals Limited. The application concerned (among other things) whether an entitlement offer announced by Alto operated to stymie an unconditional takeover bid made by Habrok (Alto) Pty Ltd. The Panel considered (among other things) that an announcement by Alto recommending rejection of Habrok’s bid was misleading or had the potential to mislead shareholders and the entitlement offer, together with Alto’s announcement recommending rejection of Habrok’s bid gave rise to unacceptable circumstances. The Panel made orders, which included Alto immediately taking all action necessary to terminate its entitlement offer and delaying any new capital raising for two weeks following despatch of further target disclosure.

2. In these reasons, the following definitions apply.

- Alto** Alto Metals Limited
- Alto Board** The board of directors of Alto
- Entitlement Offer** has the meaning given in paragraph 11
- FIRB** Foreign Investment Review Board

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Goldsea	Goldsea Australia Mining Pty Ltd
Goldsea Bid	has the meaning in given in paragraph 4
Habrok	Habrok (Alto) Pty Ltd
Habrok Bid	has the meaning given in paragraph 7
Longreach	Longreach Capital
Marymount	Marymount Pty Ltd
Recommendation Announcement	has the meaning given in paragraph 13
Revised Goldsea Bid	has the meaning given in paragraph 8
Shareholder Intention Statements	has the meaning given in paragraph 16
Sinotech	Sinotech (Hong Kong) Corporation Limited
Windsong	Windsong Valley Pty Ltd
Windsong Facility	has the meaning given in paragraph 64
12 July Board Meeting	The meeting of the Alto Board held on 12 July 2020
12 July Board Minutes	The minutes prepared in respect of the 12 July Board Meeting

FACTS

3. Alto is an ASX listed company (ASX code: AME). Habrok, the applicant, has a relevant interest in 12.55% of Alto shares.
4. On 21 February 2020, Goldsea announced its intention to make a cash takeover bid for all the ordinary shares in Alto for 6.5 cents per share (**Goldsea Bid**). The Goldsea Bid was conditional on a number of conditions, including obtaining FIRB approval.
5. In response to Goldsea's bidder's statement in respect of the Goldsea Bid released on 24 March 2020, Alto released its target's statement on 20 April 2020 recommending that Alto shareholders reject the Goldsea Bid.
6. On 1 May 2020, Goldsea released a supplementary bidder's statement in respect of the Goldsea Bid and Alto released a supplementary target's statement, this time recommending that Alto shareholders accept the Goldsea Bid.
7. On 22 May 2020, Habrok announced its intention to make an unconditional cash takeover bid for 100% of the ordinary shares and options in Alto for 6.6 cents per share (**Habrok Bid**).
8. On 28 May 2020, Goldsea increased the offer price under the Goldsea Bid to 7.5 cents per share and waived all conditions of the Goldsea Bid other than the FIRB approval condition in its second supplementary bidder's statement (**Revised Goldsea Bid**). Alto affirmed its recommendation of the Revised Goldsea Bid that same day.

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9. On 24 June 2020, Goldsea announced its intention to allow the Revised Goldsea Bid to lapse, given its failure to obtain FIRB approval.
10. On 10 July 2020, Habrok lodged its bidder's statement in respect of the Habrok Bid.
11. On 13 July 2020, Alto announced that it would conduct a 1 for 4 accelerated pro-rata non-renounceable entitlement offer to raise approximately \$5.1 million at 7 cents per share (**Entitlement Offer**).
12. Alto's announcement of the Entitlement Offer also disclosed that Mr Matthew Bowles had been appointed by the Alto Board to the position of Managing Director and CEO from his previous role as a non-executive director.
13. Also on 13 July 2020, Alto announced its recommendation that Alto shareholders reject the Habrok Bid (**Recommendation Announcement**). The Recommendation Announcement included (among other things) the following undervalue statement:

"The Directors of Alto have assessed the Offers, and it is the Directors' very strong view that the unsolicited Offers are opportunistic and undervalue your shares and options, and shareholders and optionholders should reject the Offers."
14. The Recommendation Announcement also stated that in reaching their recommendation, the Alto directors had considered several factors in support of the undervalue statement and would provide further details for their recommendation in Alto's target's statement.
15. On 15 July 2020, the day after Habrok's application, Alto made an announcement stating *"Statements of intention received from key shareholders holding 38.15% of the issued shares in Alto, [stating] that they do not intend to accept the Habrok Offer"*. Alto also stated that it had secured \$2.6 million in acceptances and commitments under the Entitlement Offer.
16. On 16 July 2020, Alto announced that additional statements of intention had been received, such that shareholders *"holding 51.45% of the Alto shares on issue have confirmed their intention not to accept the Habrok Share Offer"* (together with the intention statements referred to in paragraph 15, **Shareholder Intention Statements**).
17. On 17 July 2020, Habrok announced that it would increase the offer price under the Habrok Bid to 7 cents per share, subject to Alto (among other related things) terminating the Entitlement Offer. On 20 July 2020, Alto announced that the persons providing the Shareholder Intention Statements had confirmed that *"they would not accept a takeover offer from Habrok of \$0.07 per share"*.

APPLICATION

18. By application dated 14 July 2020, Habrok sought a declaration of unacceptable circumstances. Habrok submitted (among other things) that:
 - (a) Alto had sought to stymie the Habrok Bid by increasing the controlling position of Windsong¹ (an entity associated with Mr Terry Wheeler, a non-executive

¹ Habrok submitted that Windsong had voting power of 19.4% in Alto

director of Alto) and “issuing up to 25% of issued capital under an equity raising in circumstances where there is no clear need for funds”.

- (b) The pricing and timing of the Entitlement Offer effectively frustrated the Habrok Bid, notwithstanding that the bid is unconditional.
 - (c) The Entitlement Offer had the potential effect of consolidating control of Alto in the hands of Windsong, without any control premium being paid to Alto shareholders or any shareholder approval.
 - (d) Habrok would need to increase the offer price under its bid if it wished to participate in the Entitlement Offer and accordingly, the Entitlement Offer operates as an unacceptable lock-up device.
 - (e) There were disclosure deficiencies in the Recommendation Announcement regarding the Alto Board’s recommended rejection of the Habrok Bid.
 - (f) The terms of Mr Bowles’s appointment to the Alto Board impacted Habrok’s costs of realising its intentions and objectives in respect of the Habrok Bid.
19. Habrok submitted that the effect of the above circumstances operated to coerce or rush Alto shareholders into either selling their shares on-market, participating in the Entitlement Offer and/or rejecting the Habrok Bid on an uninformed basis, inconsistent with the principles in sections 602(a) and 602(b).²

Interim orders sought

20. Habrok sought interim orders, including that “Alto be restrained from offering or accepting subscriptions under the Entitlement Offer”.
21. The President (Alex Cartel) considered the interim orders request on an urgent basis.
22. Following consideration of submissions from the parties, the President was minded to make interim orders, for reasons including that:
- (a) there was no material to suggest that Alto was in urgent need for funds
 - (b) announcing an entitlement offer immediately following the issue of a bidder’s statement was unusual
 - (c) the Entitlement Offer was being conducted on an accelerated basis and
 - (d) shares issued under the Entitlement Offer were likely to impact Alto’s issued capital and Habrok may have difficulty in participating in the Entitlement Offer as a result of the minimum bid price rule under section 621(3).³
23. Accordingly, the President made interim orders on 15 July 2020 (see **Annexure A**). The interim orders stated in effect that Alto must immediately take all action necessary to defer its Entitlement Offer until further order of the Panel. This

² Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

³ See also discussion at paragraph 82

preserved the status quo pending determination of Habrok's application by a sitting Panel once appointed.⁴

Final orders sought

24. Habrok sought final orders, including in effect that:
- (a) Alto terminate its Entitlement Offer and unwind any subscription allocations
 - (b) Alto only be permitted to undertake an entitlement offer during the 3 months following the date of Habrok's bidder's statement on certain terms, including that the entitlement offer is subject to shareholder approval, undertaken on a non-accelerated basis and priced at the same price as the Habrok Bid
 - (c) the terms of Mr Bowles' employment as CEO be varied, including to allow Alto to terminate Mr Bowles' employment on 6 months' notice and
 - (d) Alto make an announcement to the market correcting and clarifying the statements and omissions identified by the Panel as being deficient.

DISCUSSION

25. We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.

Decision to conduct proceedings

26. We received preliminary submissions from Alto. Alto submitted that the Panel should not conduct proceedings on the basis that:
- (a) the claims in the application were unlikely to give rise to unacceptable circumstances
 - (b) the granting of the remedies sought by Habrok would be unfairly prejudicial to Alto in that *"it would unreasonably restrict Alto's legitimate and reasonable activities which are not restricted by the terms of the Habrok Offer"* and
 - (c) *"the application is vexatious and contrary to public policy, as Habrok had the ability to restrict Alto from being able to conduct the Entitlement Offer or enter into the CEO Appointment by the use of market-standard conditions to its offer, but chose not to do so."*
27. In our view, the application raised concerns that warranted consideration, including but not limited to the timing of the Entitlement Offer and the juxtaposition of the Alto directors' *"very strong view"* that the Habrok Bid was opportunistic and undervalued Alto's shares compared to their earlier recommendation of the Goldsea Bid. Accordingly, we decided to conduct proceedings on all matters.

Recommendation Announcement – disclosure deficiencies?

28. Habrok submitted that the statement made in the Recommendation Announcement by the Alto directors (see paragraph 13) was an undervalue statement within the meaning of Guidance Note 22: *Recommendations and Undervalue Statements* and that

⁴ Guidance Note 4: *Remedies General* at [10]

the reasons given to substantiate their recommendation “are incomplete and neither soundly-based nor reasonable”.

29. We agree that the statement in the Recommendation Announcement is an undervalue statement.⁵ Guidance Note 22 provides that if a target’s directors make a recommendation, and it includes (expressly or by implication) an undervalue statement, then they should either make their reasons for the recommendation clear or, if more work is needed to finalise the reasons, they should clearly state that the reasons for the recommendation will be disclosed later (but no later than the issue of the target’s statement).⁶
30. Guidance Note 22 further provides that where a director recommends that shareholders reject a bid relying on an undervalue statement, the Panel will consider whether there are clearly disclosed reasons for the statement, which are soundly-based and reasonable, by looking at whether the undervalue statement is supported by internal analysis or external advice, and whether the director has provided shareholders with sufficient information to allow them to make an informed assessment of the statement.⁷
31. Guidance Note 22 raises a number of issues for consideration in respect of the Recommendation Announcement, in particular:
 - (a) Are the reasons for the undervalue statement soundly-based and reasonable?
 - (b) Are the reasons for the undervalue statement complete?
 - (c) Could Alto rely upon providing more comprehensive reasons in its target’s statement in respect of the Habrok Bid when shareholders were being asked to make a decision as to whether to subscribe for shares under the Entitlement Offer before the release of the target’s statement?

We consider each of these issues in turn.

Are the reasons for the undervalue statement soundly-based and reasonable?

32. The Recommendation Announcement stated that in reaching their recommendation, the Alto directors had considered several factors in support of their undervalue statement, including that:
 - (a) Alto being the subject of three separate unsolicited takeover offers in the last 15 months was a clear endorsement that “third parties can see the long-term value potential associated with the Company’s Sandstone Gold Project”

⁵ Guidance Note 22: *Recommendations and Undervalue Statements* at [6] defines an undervalue statement as “a statement, or other representation, that says, or implies, that the value of an offer under a bid is less than the value of the securities in the target the subject of the offer”

⁶ Guidance Note 22: *Recommendations and Undervalue Statements* at [8]

⁷ Guidance Note 22: *Recommendations and Undervalue statements* at [15]

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- (b) the Habrok Bid offer price of 6.6 cents per share did not “represent a premium to recent trading price of Alto shares” and represented “a 5.7% discount to the Entitlement Offer price of at (sic) \$0.07 per new share announced today” and
- (c) the Habrok Bid failed “to recognise any of Alto’s unrealised potential”.
33. Habrok made a number of submissions, including that Alto had failed to substantiate its undervalue statement and “instead relied on misleading information such as the illusory revised Goldsea Offer price and Alto’s recent trading to illustrate the value of its Shares.”⁸
34. Alto submitted that the reasons provided by the Alto directors were consistent with Guidance Note 22, including because the Recommendation Announcement “clearly discloses the reasons for the recommendation” and that “the reasons are soundly-based and reasonable”.
35. We accept that the Recommendation Announcement, on its face, discloses reasons for the Alto directors’ recommended rejection of the Habrok Bid. However, drawing on our commercial experience, the Recommendation Announcement does not, on its face, satisfactorily address the directors’ earlier recommendation of the lower (at the time 6.5 cents) and more conditional Goldsea Bid. Coupled with the curious timing of the Entitlement Offer, we questioned the basis on which the undervalue statement was made in the Recommendation Announcement and why the Alto directors were recommending the rejection of the Habrok Bid.
36. On examination of Alto’s internal records, we noted an absence of adequate evidence to suggest that the Alto directors had undertaken any substantive assessment that would support the undervalue statement in the Recommendation Announcement.
37. During the course of proceedings, we received from Alto an internal email that was circulated the day prior to the 12 July Board Meeting which stated:
- “The Board also needs to discuss a ‘Reject’ recommendation, on the basis the board are intending to proceed with the proposed Entitlements Issue”.*⁹
38. The Alto Board’s recommendation was subsequently considered at the 12 July Board Meeting. The 12 July Board Minutes under the heading “Entitlements Issue & Habrok Bidders Statement” stated as follows:
- Mr Bowles said that increasing the entitlements issue price to \$0.07 decoupled it from the Habrok Offer.*
- Mr Bowles said that an entitlement issue at \$0.07 would mean the Company could not recommend the Habrok Offer at \$0.066.*
- The Board confirmed that the Company would recommend to shareholders to REJECT the Habrok offer.*

⁸ Habrok submitted that increase in the offer price for the Revised Goldsea Bid was “seemingly illusory given the subsisting FIRB condition”

⁹ Further details of the email are discussed at paragraph 73

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...

The Board confirmed that the entitlements issue price would be set at \$0.07 for one new share for every four shares held.

39. The lack of deliberation around the directors' recommendation recorded in the 12 July Board Minutes strikes us as curious, particularly given the significance of the decision being made by the Alto Board. Of particular concern is the fact that the 12 July Board Minutes do not record, in any substance, that the Alto Board had considered any of the factors set out in the Recommendation Announcement (including the factors set out in paragraph 32 above) in making its recommendation.
40. In addition, while the 12 July Board Minutes record that the Alto Board "*discussed the content of the various announcements to be finalised today*", including the Recommendation Announcement, the minutes do not record that the Alto Board resolved to approve the announcement.
41. We sought further submissions from Alto as to whether it had otherwise received or considered any advice when considering its recommendation in respect of the Habrok Bid.
42. Alto submitted (among other things) that:
 - (a) The purpose of the 12 July Board Meeting "*was predominantly to approve the Entitlement Offer, rather than discuss the Habrok bid further*". However, we were not otherwise provided with any other board meeting minutes or materials to show that the Alto directors had deliberated or considered their recommendation in respect of the Habrok Bid.
 - (b) "*[I]nternal analysis and external advice [in respect of its recommendation] was provided in the form of the draft announcement*" that was prepared by its corporate adviser, Longreach, "*as well as the many conversations between [Longreach] and the Board members since 22 May 2020.*" However, we were informed by Alto that "*written records of these many conversations have not been maintained*".
43. On the basis of the above, we consider that there is limited material to establish that the Alto directors had considered any internal analysis or external advice which would support the undervalue statement in the Recommendation Announcement. We do not consider that the provision of the draft announcement constituted analysis or advice in the relevant sense. Further, while Alto submitted that it did not maintain records of the verbal advice it had received from Longreach, it also did not provide any descriptions of what was said in such conversations (despite being requested on a number of occasions to do so as part of the Panel's briefs). Therefore, it was difficult for us to understand the nature of any advice that Alto may have received.
44. We also consider that Alto's internal records as provided to us do not adequately establish that its directors had appropriate regard to the matters set out in the Recommendation Announcement in reaching their decision to recommend rejection of the Habrok Bid. Rather, the only inference available based on the material before

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us is that the pricing of the Entitlement Offer was an important factor upon which the directors determined to recommend rejection of the Habrok Bid.

45. The making of a takeover bid for a company is a critical time for its shareholders and shareholders will naturally look to their directors to provide advice.¹⁰ Given the importance of the directors' recommendation and its ability to influence the outcome of the bid,¹¹ one would assume that such a recommendation is made by the directors on an informed and sufficiently defensible basis. In this case, the 12 July Board Minutes do not reference the matters set out in the Recommendation Announcement with any substance, in particular the reasons supporting the undervalue statement, and there was otherwise no material to show that the Alto Board had properly turned their mind to the issues in the Recommendation Announcement.
46. In the circumstances before us, where the Alto directors recommended a lower (at the time 6.5 cents) and more conditional Goldsea Bid but then changed their view on value such as to recommend the rejection of the Habrok Bid for reasons including it undervalues Alto's shares, it is incumbent on the directors to clearly articulate soundly-based and reasonable reasons for their undervalue statement. Drawing on our commercial experience, we are not satisfied the Recommendation Announcement achieves this standard. This has the potential to mislead Alto shareholders. While our focus is on the effect of the announcement, the 12 July Board Minutes do not change our view; rather, they reinforce it.

Are the reasons for the undervalue statement complete?

47. Guidance Note 22 provides that unacceptable circumstances may exist if a director's recommendation relying on an undervalue statement is incomplete to the point of being misleading or shareholders have not been given enough information to enable them to assess the merits of the proposal (see also section 602(b)(iii)).¹²
48. Habrok submitted that *"there are some blatant omissions for the... reasons for rejection (in the Recommendation Announcement), which render Alto's substantiation for rejection meaningless and thus misleading"*. These omissions as submitted by Habrok included:
- (a) Alto's failure to acknowledge its previous recommendation of the Goldsea Bid or explain what had changed since it recommended the Goldsea Bid (which was at an offer price below the Habrok Bid and subject to conditions).
 - (b) The *"inappropriate"* comparison of the Habrok Bid price to the closing price of Alto shares of 7.5 cents on 10 July 2020 (being the date Habrok lodged its bidder's statement) and to the Entitlement Offer price of 7 cents.
 - (c) The increased Alto share price following the announcement of the Revised Goldsea Bid (which increased the offer price to 7.5 cents per share) did not provide a proper benchmark for assessing the Habrok Bid, given *"the offer price was seemingly illusory given the subsisting FIRB condition..."*.

¹⁰ *Programmed Maintenance Services Limited 02* [2008] ATP 9 at [17]

¹¹ *Tully Sugar Limited* [2009] ATP 26 at [52]

¹² Guidance Note 22: *Recommendations and Undervalue Statements* at [13(a)]

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49. Alto submitted that it did not consider its recommendation to accept the Goldsea Bid on 1 May 2020 *“as particularly relevant to its consideration of the Habrok Offer”*. It submitted that several *“key developments”* had occurred since that time, including:
- (a) Alto announcing an upgrade to its Mineral Resource estimate for the Sandstone Gold Project
 - (b) Goldsea increasing its offer price to 7.5 cents per share under the Revised Goldsea Bid
 - (c) sustained positive share price performance of ASX-listed gold companies and
 - (d) sustained strength in the Alto share price following the lapsing of the Revised Goldsea Bid.
50. Alto also noted that the recommendation of the Goldsea Bid was made at a time where there was materially greater uncertainty as to the effect of the COVID-19 pandemic on global markets.
51. Given the importance that shareholders place on the advice of their directors during the time of a takeover bid, information presented to shareholders must be prepared with the highest degree of care to ensure that the information is useful and not potentially misleading.¹³
52. In this matter, we are of the view that Alto should have provided a comprehensive explanation to its shareholders as to why it had previously recommended the lower and conditional Goldsea Bid, and what developments had occurred since that time which had caused its directors to emphatically recommend rejection (*“it is the Directors’ very strong view...”*) of the higher and unconditional Habrok Bid. Without such an explanation, the Recommendation Announcement is incomplete, unbalanced and potentially misleading and Alto shareholders are left without sufficient information to make an informed assessment of the Habrok Bid.¹⁴

Could Alto rely upon providing more comprehensive reasons in its target’s statement?

53. Guidance Note 22 stipulates that unacceptable circumstances may arise if a director recommends rejection of a bid relying on an undervalue statement, and the reasons for the recommendation are not clearly disclosed or it is not clearly stated that the reasons will be disclosed later.¹⁵
54. Alto submitted that the approach to the directors’ recommendation in the Recommendation Announcement was consistent with the Panel’s guidance and recommendations in Guidance Note 22 given that:
- (a) the Recommendation Announcement clearly discloses the reasons for the directors’ recommendation *“and also states that the director’s formal recommendations will be contained in the target’s statement...”* and

¹³ Programmed Maintenance Services Limited 02 [2008] ATP 9 at [17] and [35]

¹⁴ Guidance Note 22: Recommendations and Undervalue Statements at [15]

¹⁵ Guidance Note 22: Recommendations and Undervalue Statements at [13]

- (b) the directors *“will ensure that the [sic] comprehensive reasons are disclosed in the target’s statement”*.
55. Given the concurrent timing of the Recommendation Announcement and announcement of the Entitlement Offer, in our view, it was unacceptable for Alto to rely on providing more comprehensive reasons in the target’s statement.
56. We consider that by announcing the Entitlement Offer whilst the Habrok Bid was on foot and contemporaneously with Alto’s recommendation to reject the Habrok Bid, Alto shareholders were in effect being compelled to make a choice between the Entitlement Offer and the Habrok Bid.
57. The Entitlement Offer was most likely to be undertaken prior to the release of Alto’s target’s statement, noting that:
- (a) in relation to the Entitlement Offer, the institutional component took place from 13 to 15 July 2020 and the retail component was to open on 20 July 2020 and close on 29 July 2020 and
- (b) Alto’s target’s statement was to be despatched by no later than 6 August 2020 (being 15 days after the despatch of Habrok’s bidder’s statement on 22 July 2020).
58. Accordingly, detailed information regarding the Alto directors’ reasons for rejection of the Habrok Bid was not, or would not likely be, available to Alto shareholders at the time of determining whether to take up the Entitlement Offer (or alternatively, accept the Habrok Bid). Alto shareholders could only likely turn to the Recommendation Announcement for an understanding of their directors’ advice in relation to the Habrok Bid. We have expressed our views in relation to the disclosure deficiencies in the Recommendation Announcement (see paragraphs 43 to 46 and 51 to 52 above).
59. On the above basis, we consider that Alto shareholders have not been given sufficient information to make an informed assessment of the Habrok Bid, at a time where they were being asked to make a decision as to whether to subscribe for shares under the Entitlement Offer. Therefore we consider that Alto could not, in the circumstances of this matter, rely upon providing more comprehensive reasons in its target’s statement.

Entitlement Offer – a defensive act?

60. We considered Habrok’s submission that the Entitlement Offer stymied its takeover bid by increasing the controlling position of Windsong and *“issuing up to 25% of issued capital under an equity raising in circumstances where there is no clear need for funds, Habrok is unable to readily participate and where those new Alto shares cannot participate in the Habrok Offer (without ASIC relief).”*
61. Our view is that this was not a frustrating action as defined in Guidance Note 12: *Frustrating action* because the Habrok Bid had already been made and was unconditional and, therefore, the Entitlement Offer did not trigger a condition of a

bid.¹⁶ However, the Guidance Note also states that *“In rare circumstances, an action that does not breach a bid condition or allow a bid to be withdrawn under s652C may still be unacceptable”*.¹⁷ Accordingly, the action could still be unacceptable depending on the circumstances.¹⁸

Need for funds

62. Habrok submitted that the *“chilling effect”* of the Entitlement Offer cannot be justified by Alto, including because Alto had not demonstrated the urgent need for funds or properly substantiated the timing of the Entitlement Offer being announced one trading day after the issue of Habrok’s bidder’s statement.
63. When considering a company’s need for funds, the Panel looks at the company’s financial situation, the amount sought to be raised and the suitability of raising capital by the relevant entitlement offer. The Panel is likely to accept the directors’ decision on these issues if the decision appears to be reasonable and supported by rational reasons unless the applicant can point to something that suggests deeper inquiry may be warranted.¹⁹
64. In this matter, Habrok submitted that Alto had in place a \$1 million loan facility from Windsong (**Windsong Facility**) which was only drawn to \$250,000 and therefore, there was no clear or urgent need for funds that would justify the Entitlement Offer. Coupled with the curious timing of the Entitlement Offer, we considered it appropriate to conduct a deeper inquiry into Alto’s need for funds.
65. Alto submitted that it had an urgent need for funds.
66. In connection with why the funding was urgent, Alto made a number of submissions including that:
 - (a) The Windsong Facility was *“only ever intended to be [provided] on an interim basis”* and that *“it is clearly preferable to obtain the necessary funding through equity on a pro-rata basis from shareholders, rather than incurring debt...”*
 - (b) It was clear from Alto’s cash forecast to 31 December 2020 that even if the Windsong Facility was fully drawn-down, it would not be sufficient to fund Alto’s activities to the end of the year.
 - (c) *“Alto [was] in urgent need of funds to continue exploration to meeting minimum expenditure commitments to maintain its tenements in good standing and advance exploration for the benefit of all shareholders in the current gold environment.”*
67. In response, Habrok submitted that Alto had failed to detail why the proposed use of funds was indeed urgent or *“substantiate why it could not draw down available funds*

¹⁶ See Guidance Note 12: *Frustrating action* at [3]. A frustrating action is an action by a target, whether taken or proposed, by reason of which a bid may be withdrawn or lapse, or a potential bid is not proceeded with

¹⁷ Guidance Note 12: *Frustrating action* at footnote 3

¹⁸ See, for example, *Babcock & Brown Communities Group* [2008] ATP 25 at [29]-[36], *Gondwana Resources Limited* [2014] ATP 9 at [31] and *Freshtel Holdings Limited* [2016] ATP 15 at [28]. See also section 657A(3)

¹⁹ Guidance Note 17: *Rights Issues* at [12] (noting this guidance is provided in a different context)

under the Windsong Facility to meet all material and unavoidable proposed expenditure in the short term”.

68. Both Habrok and Alto made a number of submissions on their views as to Alto’s available funding. Alto submitted that it had less than two calendar quarters of available funding, whereas Habrok was of the view that Alto had approximately 2.2 calendar quarters of funding. The various submissions from the parties were difficult to reconcile given the differing information that was presented to support their conflicting views.
69. Alto also made submissions that it had been considering the need for a capital raising since 15 August 2019. However, it submitted that its capital raising activities had been thwarted as it had been “*plagued by conditional takeover bids*”²⁰ and that it was “*only free from a takeover proposal between 30 November 2019 and 21 February 2020*”. This coincided with the Christmas/New Year period which Alto did not consider to be a desirable time to undertake a capital raising. Accordingly, Alto considered the Entitlement Offer to be the most appropriate capital raising opportunity available because “*it could be undertaken without triggering any defeating condition of any takeover bid*”.
70. We have some sympathy with Alto’s submission given it had appeared hindered in its ability to undertake a capital raising for a substantive period of time. However on the material before us, we consider that while Alto may have a need to raise funds, Alto did not have an urgent need for funds that would justify the timing of the Entitlement Offer being announced the trading day after the issue of Habrok’s bidder’s statement.²¹

Pricing and timing

71. Alto had submitted that at the 12 July Board Meeting following discussions amongst the Alto Board members, major shareholders and advisers, it had been decided to increase the Entitlement Offer price from 6.6 cents to 7 cents per share. It submitted that consideration had been had to the fact that:
- (a) the Alto share price had closed on 10 July 2020 at 7.5 cents²²
 - (b) the current strength in the equity market for gold companies and

²⁰ Middle Resources Limited announced its intention to make a takeover bid for Alto on 1 March 2020. The offer lapsed on 29 November 2019. Goldsea announced its intention to make a takeover bid for Alto on 21 February 2020. The offer lapsed on 21 February 2020. Habrok announced its intention to make a takeover bid for Alto on 22 May 2020

²¹ We note that Alto’s estimates of its cash flows provided to Habrok in June 2020 suggested a worse financial situation than their internal accounts in July 2020. We also note that there was some material provided during the course of proceedings which indicated that Alto had available to it additional debt financing. This suggested to us that Alto had overstated its urgency for need for funds via the Entitlement Offer

²² While Alto’s announcement of the Entitlement Offer on 13 July 2020 stated that the offer represented a 6.67% discount to the last closing share price of 7.5 cents, Alto was informed by its financial advisers on 12 July 2020 that the 10 day volume weighted average price of Alto shares was 6.98 cents

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- (c) it had received confirmation, or it was considered likely, that major shareholders would participate in the Entitlement Offer.
72. However, Alto's submissions cannot be reconciled against the 12 July Board Minutes which do not reference any of the matters referred to in paragraph 71 above as being the rationale for revising the Entitlement Offer price. Rather, the 12 July Board Minutes suggest that the pricing of the Entitlement Offer had been designed in response to the Habrok Bid, particularly as the minutes record that *"increasing the entitlements issue price to \$0.07 decoupled it from the Habrok Offer"* and *"would mean"* Alto could recommend rejection of the Habrok Bid.
73. Our concerns were further heightened by an email circulated by Mr Bowles to the rest of the Alto Board (amongst others) ahead of the 12 July Board Meeting which stated under the heading "Entitlement Issue Process and Pricing" as follows:
- "It is proposed that the pricing entitlement issue be varied to \$0.07cps. This has been discussed with both Richard and Terry (other Alto directors) and we are all in agreement, on the basis:*
- 7 cps will uncouple the AME share price for the Habrok bid price..."*
74. As noted above in paragraph 37, in that same email, under the heading "response to the Bidders Statement", Mr Bowles also stated *"The Board also needs to discuss a 'Reject' recommendation, on the basis the board are intending to proceed with the proposed Entitlements Issue."*
75. On further inquiry, we were informed by Alto that *"no formal advice was provided from any third party advisers"* when determining to increase the Entitlement Offer price.
76. We were also concerned that Alto was not able to produce any substantive material to evidence the Alto Board's consideration of the Entitlement Offer, including as to its timing, price or size. We note that:
- (a) The decision to *"reinstate the plans for an entitlement offer in June 2020"* was made at *"an informal Board meeting"* on 15 June 2020. Alto did not maintain any minutes in respect of this meeting (although informal notes were kept by the company secretary).
- (b) The decision to structure the Entitlement Offer on an accelerated, non-renounceable basis and the original offer price at 6.6 cents was determined at an *"informal Board meeting"* held on 29 June 2020. Alto did not maintain any minutes or notes in respect of this meeting. Alto's explanation of how it set the original offer price also did not reference any advice received from external advisers.
- (c) Alto submitted that at the 12 July Board Meeting, a representative from Longreach had discussed that an offer price under the Entitlement Offer which equaled the price under the Habrok Bid *"risked fostering a situation where Habrok acquired shares on-market in circumstances where the particular selling shareholder ultimately may not wish for control to pass to Habrok, but was selling their 'head-stock' on market in order to participate in the Entitlement Offer ..."* This discussion was

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not recorded in the 12 July Board Minutes. There was otherwise limited material to show that Alto had received advice in determining the Entitlement Offer price (and indeed, no formal advice).

- (d) Morgans Corporate Limited was only engaged by Alto to act as lead manager to the Entitlement Offer on 3 July 2020.
- (e) The 12 July Board Minutes were brief and provided little detail around the deliberations in respect of the Entitlement Offer. While we acknowledge that minutes are not intended to be a transcript, we expect minutes to include an accurate record of all relevant deliberations that had occurred during the course of the meeting. Here, these deliberations were completely absent.
- (f) There were no materials of substance to show that the Entitlement Offer had been priced against factors that one would typically use for a capital raising. Nor were there sufficient materials to support a conclusion that the Alto Board had considered or received advice as to the timing of the Entitlement Offer.

77. On the basis of the above and the material before us, we do not consider that the Alto directors had considered sufficient analysis or advice in relation to timing or pricing of the Entitlement Offer. The most logical conclusion that can be inferred from the materials provided is that the pricing and timing of the Entitlement Offer were linked, at least in part, to the Habrok Bid and used by the Alto Board to justify their reject recommendation.

Control effect

- 78. Habrok submitted that the Entitlement Offer had the potential effect of “*consolidating control of Alto in the hands of Alto’s related and also largest shareholder, Windsong*” by allowing it to “*increase from its current 19.4% shareholding to above 22%*”.
- 79. Alto submitted that as at 15 July 2020, it had received acceptances or commitments under the Entitlement Offer representing a total of approximately \$2 million and that, “*in the unlikely event that only [these existing commitments] participate in the Entitlement Offer, Windsong’s voting power would increase to 21.66%. This would fall within the 3% creep provision permitted by item 9 of section 611*”.
- 80. On the basis of the creep exception being available to Windsong, we do not consider the Entitlement Offer to have the unacceptable control effect in the circumstances.

Preclusion from participation

- 81. Habrok submitted that because the Entitlement Offer price of 7 cents was above the Habrok Offer price of 6.6 cents, “*Habrok cannot elect to participate in the Entitlement Offer and thus avoid dilution to its 12.55% shareholding*” without triggering the automatic price variation rule under section 651A.
- 82. We note that the submissions from the parties were initially made in the context of the minimum bid price rule under section 621(3) (as this was the section referred to in Habrok’s application). However, during the course of proceedings, it was determined that the correct provision that was applicable was the automatic price

variation under section 651A as Habrok's bidder's statement had been lodged and despatched to Alto shareholders.

83. Section 651A provides that if the bidder under a bid for cash purchases bid class shares for a cash amount greater than it has offered under the bid after offers have been dispatched, an automatic increase in the bid occurs and any shareholders who have already accepted an offer are also entitled to the additional consideration.
84. Habrok submitted, therefore, that *"the effective cost for Habrok to participate in the Entitlement Offer to maintain its percentage shareholding is not just 7 cents per Share for its existing holding, but potentially a further \$2.09 million in making the takeover offer to all of the existing shareholders and up to a further \$4.49 million if ASIC granted relief to extend its takeover offer to the new shares under the Entitlement Offer"*.
85. Alto submitted that *"Habrok had the ability to impose a market-standard condition on its bid effectively prohibiting Alto from undertaking the Entitlement Offer...without triggering a frustrating action... [but] chose not to impose such a condition."*
86. ASIC noted that it did not necessarily share the view that the minimum bid price rule would be triggered if Habrok chose to participate in the Entitlement Offer, *"recognising that the minimum bid price rule may not necessarily apply to subscription for new shares, as distinct to purchases of existing shares"*. We note that similar to the minimum bid price rule, the automatic price variation rule applies to the 'purchases' of shares.
87. There appears to be support at law for the proposition that in interpreting the *Corporations Act 2001 (Cth)* (and antecedents), that subscribing for shares is not purchasing them. The Panel recognised this in *Skywest Limited* [2004] ATP 10 at [71]:
"We do not accept Skywest's submission that the conversion of the Convertible Notes and corresponding issue of new shares to CVC constituted a "purchase". We note and accept the long-standing principle set out in Re VGM Holdings Ltd [1942] 1 All ER 224, in which the English Court of Appeal held that the word "purchase" in the financial assistance provision of the UK Companies Act 1929 did not include the acquisition of shares by subscription or allotment."
88. Given that we consider the circumstances to be unacceptable for other reasons, we did not need to reach a conclusion on the question of whether the automatic variation rule was triggered. We accept Habrok's submission that it would be commercially disadvantageous for it to participate in the Entitlement Offer even if it was legally able to do so.

Lock-up device

89. Habrok submitted that the Entitlement Offer is tantamount to a lock-up device insofar as it potentially hinders or impedes Habrok from acquiring control of Alto.
90. Guidance Note 7: *Lock-up devices* defines 'lock-up device' as *"an arrangement that encourages or facilitates a control transaction and potentially hinders another actual or potential control transaction"*.

91. Given that we found the Entitlement Offer to give rise to unacceptable circumstances for other reasons, we did not need to form a view on whether the Entitlement Offer was, in effect, an unacceptable lock-up device.

Conclusion on defensive action

92. In the circumstances of this case, it is necessary to consider the Entitlement Offer and Recommendation Announcement in combination given the apparent link between them.
93. As discussed in paragraphs 44 and 77, in our view, the materials support a conclusion that the pricing of the Entitlement Offer was an important factor that was used by the directors to justify their recommendation to reject the Habrok Bid. It was on this basis that the directors appear to have increased the Entitlement Offer price.
94. We also did not consider there to be a compelling need for Alto to undertake the Entitlement Offer at the time it did (see paragraph 70).
95. There was also insufficient material to show that the Alto directors had deliberated or considered sufficient advice in relation to the pricing and timing of the Entitlement Offer (see paragraph 77) or the Recommendation Announcement (see paragraph 43).
96. These matters are significant because the timing of the Entitlement Offer, the Recommendation Announcement and the Habrok Bid presented shareholders with, effectively, a choice to accept the bid or subscribe for additional shares (or do nothing). If shareholders subscribed for shares, that would be to the detriment of Habrok for two reasons: firstly, its bid did not extend to those shares (and could not, without ASIC relief) and secondly, even if Habrok obtained the necessary relief, shareholders who subscribed for shares would be unlikely to accept Habrok's bid at 6.6 cents as they had just subscribed for shares at 7 cents. Alto was asking its shareholders to make this choice before they had been given adequate information to assess the Habrok Bid.
97. While Alto's share price has consistently traded above Habrok's offer price of 6.6 cents since 1 June 2020, we consider that Habrok lost momentum in its bid and negotiations with Alto as a result of Alto's actions. The timing here, of all the components in combination, effectively stalled Habrok's bid before it had the opportunity to commence.
98. On the basis of the above, we consider that the timing and pricing of the Entitlement Offer in conjunction with the timing of the Recommendation Announcement were in part designed as a defensive tactic in response to the Habrok Bid and, as a defensive act, has adversely affected the prospects of the Habrok Bid succeeding.

Shareholder Intention Statements - misleading?

99. The Shareholder Intention Statements were received from Alto's top five major shareholders and used by Alto, in effect, as a reason to support the Entitlement Offer rather than the Habrok Bid.

100. Guidance Note 23: *Shareholder intention statements* provides that there is a risk that a shareholder intention statement will be misleading, or at least confusing, if (among other things) it is published without detailed information regarding the shareholdings.²³
101. The Shareholder Intention Statements disclosed the identity of the shareholders and details of their shareholdings.²⁴ However, we consider that the Shareholder Intention Statements required further details that certain of the shareholders who provided such statements are related to Alto directors, namely:
- (a) Windsong and Marymount – entities associated with Mr Terry Wheeler, a non-executive director of Alto.
 - (b) Sinotech – Dr Jingbin Wang, a non-executive director of Alto, is also the Chairman of Sinotech Minerals Exploration Co. Ltd, an entity related to Sinotech.
102. The Shareholder Intention Statements were provided by shareholders holding approximately 51% of Alto’s share capital. Windsong, Marymount and Sinotech account for nearly half of that shareholding (together they hold approximately 25% of Alto’s total share capital).
103. We consider that it is important for Alto shareholders to be informed that shareholders representing a substantive proportion of shares to which the Shareholders Intention Statements relate are in fact related to the Alto directors. Without such disclosure, the Shareholder Intention Statements (as they appeared in Alto’s ASX announcements from 15 and 16 July 2020) are misleading or have the potential to mislead Alto shareholders. This is particularly so given the statements were being used not only to discourage acceptance of the Habrok Bid but to encourage participation in the Entitlement Offer before Alto’s target’s statement was available. We also note that Windsong had provided Alto with the Windsong Facility and therefore had an interest in encouraging take up of the Entitlement Offer to see its loan repaid.
104. We also consider that, given the information deficiencies in the Recommendation Announcement, those shareholders who provided Shareholder Intention Statements (and who were not directors of Alto) did not have sufficient information to make an informed assessment of the merits of the Habrok Bid at the time of providing such statements, contrary to the principles in section 602.

Appointment of Mr Bowles as CEO

105. The key terms of Mr Bowles’ appointment to the position of Managing Director and CEO included:²⁵

²³ Guidance Note 23: *Shareholder intention statements* at [8]

²⁴ Guidance Note 23: *Shareholder intention statements* at [11]

²⁵ A summary of the key terms of Mr Bowles’ executive service agreement is set out as an annexure to Alto’s ASX announcement from 13 July 2020 announcing the launch of the Entitlement Offer

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- (a) *Remuneration* – Mr Bowles will receive \$260,000 per annum (exclusive of superannuation contributions) and
 - (b) *Termination rights and benefits* – Mr Bowles’ executive service agreement could be terminated by Alto on 12 months’ notice or by Mr Bowles on 6 months’ notice. If the executive service agreement is terminated for the reason of redundancy, Alto will pay a severance payment equal to 12 months’ salary.
106. Habrok submitted (among other things) that the terms of Mr Bowles’ appointment as CEO “... carry significant financial implications given the material increase to the CEO’s salary and his notice period (when compared to his predecessor)²⁶, which limit the ability of (or increase the cost to) Habrok to realise its intentions and thus preclude the acquisition of Shares from taking place in an efficient and informed market (section 602(a)).” It further submitted that the timing of Mr Bowles’ appointment “on the trading day immediately following the lodgement of the Habrok Bidder’s Statement is extraordinary” and “seems designed to give Mr Bowles a 12 month termination benefit without Shareholder approval”.
107. Alto submitted (among other things) that:
- (a) Alto’s intention to appoint Mr Bowles as Managing Director had been publicly disclosed previously on a number of occasions before Habrok had announced its bid and that “[t]he market, and any diligent prospective bidder, would have been aware of the intended appointment and was entitled to impose conditions as to the terms of that engagement”.
 - (b) The terms of Mr Bowles’ appointment had been discussed with its commercial and legal advisers, and that Alto considered “its remuneration package [to be] reasonable when compared to the package provided by Tanga [Resources Limited]”, an ASX-listed company from which Mr Bowles had resigned as CEO prior to taking up the position as Alto’s CEO.
108. Some of the material provided to us during the course of proceedings gave us pause to consider the appropriateness of Mr Bowles’ appointment, particularly the timing given that the intention to appoint Mr Bowles had been outstanding for approximately 4 months.
109. However, we do not consider that the material before us was sufficient to establish that the appointment of Mr Bowles as CEO and the terms of his appointment are unacceptable.

Overall effect

110. In considering this matter, we did not look at the Entitlement Offer, the Recommendation Announcement and the Shareholder Intention Statements in isolation, but rather, assessed each aspect within the surrounding circumstances.

²⁶ Habrok submitted that “The Managing Director and CEO immediately preceding Mr Bowles was Mr Ryan, who received a daily fee of \$1,039 for his services (which totalled \$145,356 for FY19, \$220,000 for FY18 and \$227,860 for FY17). Mr Ryan’s position was terminable by Alto on only 3 months’ notice.”

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111. Having regard to the totality of the material set out in these reasons and drawing on our commercial expertise, we consider the circumstances are unacceptable.
112. We find that the reasons provided in the Recommendation Announcement are misleading, or have the potential to mislead Alto shareholders because of the following factors in combination:
 - (a) The Recommendation Announcement did not adequately explain why the Alto directors had previously recommended the Goldsea Bid (see paragraph 52).
 - (b) The materials did not establish that:
 - (i) Alto's directors had properly considered sufficient advice in relation to the Entitlement Offer (see paragraph 77) or the Recommendation Announcement (see paragraph 43) or
 - (ii) Alto had an urgent need for funds (see paragraph 70).
 - (c) Alto's internal records did not adequately establish that the Alto directors had appropriate regard to the matters set out in the Recommendation Announcement as the bases for recommending rejection of the Habrok Bid (see paragraph 44).
113. In addition, the Shareholder Intention Statements did not sufficiently disclose that certain Alto shareholders who provided such statements are related to Alto directors (see paragraph 103).
114. By reason of these information deficiencies in the Recommendation Announcement and the Shareholder Intention Statements, we consider that Alto shareholders did not have sufficient information to make an informed assessment of the undervalue statement and the merits of the Habrok Bid, such that the market for control of Alto shares was not taking place in an efficient, competitive and informed market.
115. We also consider that the timing and pricing of the Entitlement Offer in conjunction with the timing of the Recommendation Announcement were in part a defensive response to the Habrok Bid, required Alto shareholders to decide whether to take up the Entitlement Offer without adequate information to assess the Habrok Bid and has adversely affected the prospects of the Habrok Bid succeeding (see paragraphs 96 to 98).
116. In light of this, we consider that the Recommendation Announcement and the Entitlement Offer, in combination, have had an effect which may contribute to a proposed acquisition by Habrok not proceeding and is contrary to an efficient, competitive and informed market.

DECISION

Declaration

117. It appears to us that the circumstances are unacceptable:

- (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Alto or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Alto
- (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602.

118. Accordingly, we made the declaration set out in Annexure B and consider that it is not against the public interest to do so. We had regard to the matters in section 657A(3).

Orders

119. Following the declaration, we made the final orders set out in Annexure C. Under section 657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'²⁷ if 4 tests are met:

- (a) it has made a declaration under section 657A. This was done on 19 August 2020.
- (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. We are satisfied that our orders do not unfairly prejudice any person.
- (c) it gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 7 August 2020 (in relation to a supplementary brief on the declaration and orders), 14 August 2020 and 17 August 2020. Each party made submissions in response to the Panel's requests (and rebuttals in response to the supplementary brief on the declaration and orders).
- (d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons, or ensure that a takeover or proposed takeover proceeds as it would have if the circumstances had not occurred. The orders do this by (in effect):
 - (i) requiring Alto to terminate the Entitlement Offer (noting that this would trigger the conditional increase under the Habrok Bid to 7 cents).

²⁷ Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

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- (ii) for a period of 2 weeks following the despatch of a supplementary target's statement (described below in paragraph 119(d)(iv)), restricting Alto from announcing the terms of any new capital raising. This allows Alto shareholders an appropriate period to consider properly the Habrok Bid (which would be at an increased offer price), with sufficient information to assess its merits, without having to make a decision as to whether to accept into a similar capital raising. It also provides Habrok with an opportunity to reconsider the terms of its offer and potentially negotiate with Habrok.
- (iii) providing Alto shareholders who have provided Shareholder Intention Statements (other than those Alto shareholders who are related to Alto directors) with a right to withdraw their statement, given that they did not have sufficient information to make an informed assessment of the Habrok Bid at the time of the intention statement.
- (iv) requiring Alto to dispatch a supplementary target's statement including an explanation of the effect of the Panel's declaration and orders, and details of the relationship (if any) between the Alto shareholders who have provided a Shareholder Intention Statement and the Alto directors. Again, this was necessary to ensure that Alto shareholders have sufficient information to make an informed assessment of the Habrok Bid.

120. On 7 August 2020, we provided draft orders to the parties and ASIC. These orders differed from the final orders in that (in effect):

- (a) The orders requiring Alto to terminate the Entitlement Offer and restricting Alto from announcing a new capital raising were instead an order to postpone the Entitlement Offer for a period of 2 weeks following the later of the despatch of the supplementary target's statement or the date of the final orders.
- (b) Alto shareholders who had provided commitments to participate in the Entitlement Offer were given a right to withdraw their commitments.
- (c) All Alto shareholders (i.e. not just those related to the Alto directors) who had provided Shareholder Intention Statements were given the opportunity to withdraw their statements.
- (d) The supplementary target's statement required disclosure of the basis of the undervalue statement and the reasons that the Alto directors have previously recommended the lower priced and conditional Goldsea Bid.

121. In respect of the proposed order described in paragraph 120(a), Habrok submitted that termination of the Entitlement Offer was warranted because *"if the Panel accepts that Alto has failed to justify the "urgent need" for \$5.1 million, then the current Entitlement Offer should not be allowed to proceed given the impact on the Habrok Offer."*

122. Alto submitted in rebuttals that the Entitlement Offer had been suspended since 15 July 2020 and that to its knowledge, *"there has not been a single acceptance of Habrok's bid since it opened on 22 July 2020"*. Therefore, it submitted that what was affecting the likelihood of success of the Habrok Bid was its *"plainly inadequate bid price in the*

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context of Alto's share price trading at a premium to the bid price at all times [since] Habrok's bid opened", not the status of the Entitlement Offer.

123. We agree, in one sense, that the circumstances appeared to be overtaken by events given the current strength of Alto's share price. However, to ensure that Habrok's proposed takeover proceeds as it would have if the unacceptable circumstances had not occurred, we are persuaded that to restore the status quo, it was necessary to cancel the Entitlement Offer and allow a short period during which Habrok was given an opportunity to consider the terms of its bid.
124. Given the termination of the Entitlement Offer, the proposed order described in paragraph 120(b) fell away.
125. In respect of the proposed order described in paragraph 120(c), ASIC submitted that on the basis that *"the proposed order has the effect of protecting the rights of the [shareholders who gave Shareholder Intention Statements] to the extent they were misled prior to giving [the] intention statements, it is unclear why these shareholders related to Alto would have been misled by the lack of disclosure of their own connection to the Alto directors."* It submitted that those shareholders related to the Alto directors should not be permitted to withdraw their statements. We agree with ASIC's submission.
126. In respect of the proposed order described in paragraph 120(d), Alto target's statement in respect of the Habrok Bid was dispatched on 4 August 2020. Following consideration of the submissions received from the parties on whether supplementary disclosure was required in light of Alto's disclosure in its target statement and our review of the target's statement, we considered that:
 - (a) Alto had appropriately addressed its undervalue statement. The target's statement contained additional information comparing Habrok's bid price to Alto's trading prices at various points in time, including points in time where Habrok's bid price was at a premium to the Alto share price. This information appeared comprehensive. On the other hand, we note that Alto had also sought to justify its undervalue statement using information that would not have been available at the time of making the Recommendation Announcement (for example, the release of additional exploration results and an increase to its Mineral Resources estimate). The disclosure was imperfect, however, on balance, we considered it to be adequate.
 - (b) Alto had provided an adequate explanation of its decision to previously recommend the Goldsea Bid and the subsequent events that have since occurred that have led it to recommend rejection of the Habrok Bid.
127. Accordingly, we reconsidered the orders such that:
 - (a) Alto must terminate the Entitlement Offer.
 - (b) Alto must not announce a new capital raising within 2 weeks following the date of the final orders.

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- (c) Alto shareholders, other than Windsong, Marymount and Sinotech, who provided a Shareholder Intention Statement had a right to withdraw their statement.
- (d) The disclosure in Alto's supplementary target's statement would be limited to details of the relationship (if any) between the Alto shareholders who have provided a Shareholder Intention Statement and the Alto directors and an explanation of the effect of our declaration and orders.

128. On 17 August 2020, we provided to the parties and ASIC the updated orders.

129. Habrok submitted that it was necessary to further revise the order set out in paragraph 127(b) to further restrict Alto from:

- (a) announcing an intention to announce a new capital raising or
- (b) requesting or accepting commitments from its shareholders to participate in a new capital raising

for a 2 week period following the despatch of the supplementary target's statement (rather than the date of the orders).

130. Given the substantive change sought by Habrok, we sought further submissions from the parties and ASIC as to whether the Panel should make the order in the form proposed by Habrok or whether it should make a less substantive change suggested by Alto (that Alto must not announce the terms of any new capital raising within 2 weeks following the date of the orders).

131. Based on the submissions, we were of the view that:

- (a) An order restricting Alto from disclosing an intention to announce a new capital raising is overly restrictive given that Alto shareholders will expect Alto to address its plans for a capital raising following an announcement to terminate the current Entitlement Offer (as would be required as a result of our orders). This view was supported by ASIC. In the circumstances, we considered Alto's alternative wording to be more appropriate.
- (b) A restriction on requesting or accepting commitments to partake in a new capital raising was appropriate as it prevented a situation in which Alto could use any commitments obtained from its shareholders as a reason not to properly engage with Habrok in negotiations. As some of Alto's major shareholders are connected to Alto's directors and may voluntarily provide support for a new capital raising (without being requested), we also considered it necessary that Alto be prohibited from making any announcement to that effect.
- (c) The 2 week period should run following the despatch of the supplementary target's statement (as opposed to 2 weeks following the orders being made). We note that Alto made a submission that "*the additional matters required to be disclosed in the Supplementary Statement are not considered by Alto to be material...*" (emphasis added). If this is the case, the additional disclosures in the supplementary statement could be prepared quickly by Alto (i.e. within a day

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following the date of the orders) and Panel sign-off could be provided shortly thereafter for its dispatch. Therefore, a 2 week period running from the date of despatch of the supplementary statement (as opposed to the date of the orders) would only be a couple days difference.

132. The final orders reflect our views above.

Paula Dwyer
President of the sitting Panel
Decision dated 19 August 2020
Reasons given to parties 2 October 2020
Reasons published 6 October 2020

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Advisers

Party	Advisers
Alto	HWL Ebsworth Lawyers
Habrok	Allen & Overy



Australian Government

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Annexure A
CORPORATIONS ACT
SECTION 657E
INTERIM ORDERS

ALTO METALS LIMITED

Habrok (Alto) Pty Ltd made an application to the Panel dated 14 July 2020 in relation to the affairs of Alto Metals Limited (**Alto**).

The President ORDERS:

1. Alto must immediately take all action necessary, in relation to its proposed entitlement offer as announced on 13 July 2020 (**Entitlement Offer**), to defer until further order of the Panel the opening of the retail entitlement offer, including the despatch of the retail offer booklet and personalised entitlement and acceptance form, and all subsequent steps in the Entitlement Offer timetable.
2. Alto must not issue or allot any new shares under the Entitlement Offer without prior approval of the Panel.
3. Alto must make an announcement on the Australian Securities Exchange as soon as possible describing the effect of these interim orders.
4. These interim orders have effect until the earliest of:
 - (i) further order of the Panel or the President
 - (ii) the determination of the proceedings and
 - (iii) 2 months from the date of these interim orders.

Tania Mattei
Counsel
with authority of Alex Cartel
President
Dated 15 July 2020



Australian Government

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Annexure B

CORPORATIONS ACT

SECTION 657A

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

ALTO METALS LIMITED

CIRCUMSTANCES

1. Alto Metals Limited is an ASX listed company (ASX code: AME) (**Alto**). Habrok (Alto) Pty Ltd (**Habrok**), the applicant, has a relevant interest in 12.55% of Alto shares.
2. On 10 July 2020, Habrok lodged its bidder's statement in respect of an unconditional all-cash off-market takeover bid for 100% of the ordinary shares and options in Alto which it does not currently own for 6.6 cents per share.
3. On 13 July 2020, Alto announced that it would conduct a 1 for 4 accelerated pro-rata non-renounceable entitlement offer to raise approximately \$5.1 million at 7 cents per share (**Entitlement Offer**). While the announcement stated that the offer represented a 6.67% discount to the last closing share price of 7.5 cents, Alto was informed by its financial advisers on 12 July 2020 that the 10 day VWAP²⁸ of Alto shares was 6.98 cents. The institutional component of the Entitlement Offer took place from 13 to 15 July 2020. The retail component was to open on 20 July 2020 and close on 29 July 2020.
4. Also on 13 July 2020, Alto announced its recommendation that Alto shareholders reject the Habrok bid (**Recommendation Announcement**). The Recommendation Announcement included the following undervalue statement:

"The Directors of Alto have assessed the Offers, and it is the Directors' very strong view that the unsolicited Offers are opportunistic and undervalue your shares and options, and shareholders and optionholders should reject the Offers."
5. The Recommendation Announcement also stated that in reaching their recommendation, the Alto directors had considered several factors in support of their undervalue statement, including that:
 - (a) Alto being presented three separate unsolicited takeover offers in the last 15 months is a clear endorsement that *"third parties can see the long-term value potential associated with the Company's Sandstone Gold Project"*

²⁸ Volume Weighted Average Price

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- (b) the Habrok bid offer price of 6.6 cents per share “doesn’t represent a premium to recent trading price of Alto shares” and “represents a 5.7% discount to the Entitlement Offer price of at (sic) \$0.07 per new share announced today” and
 - (c) the Habrok bid “fails to recognise any of Alto’s unrealised potential”.
6. The Recommendation Announcement further stated that “Further detail regarding the reasons for the Directors’ recommendation to reject the unsolicited Offers from Habrok will be set out in the Target’s Statement”.
 7. It is noted that the Alto directors had previously recommended a conditional all-cash off-market takeover bid from Goldsea Australia Mining Pty Ltd (**Goldsea**) for 100% of the ordinary shares and options in Alto which it did not currently own for 6.5 cents per share.²⁹
 8. On 15 July 2020, Alto made an announcement stating “Statements of intention received from key shareholders holding 38.15% of the issued shares in Alto, [stating] that they do not intend to accept the Habrok Offer”. Alto also stated that it had secured \$2.6 million in acceptances and commitments under the Entitlement Offer.
 9. On 16 July 2020, Alto announced that additional statements of intention had been received, such that shareholders “holding 51.45% of the Alto shares on issue have confirmed their intention not to accept the Habrok Share Offer” (together with the intention statements referred to in paragraph 8, **Shareholder Intention Statements**).
 10. On 17 July 2020, Habrok announced that it would increase the offer price under the Habrok bid to 7 cents per share, subject to Alto (among other related things) terminating the Entitlement Offer. On 20 July 2020, Alto announced that the persons providing the Shareholder Intention Statements had confirmed that “they would not accept a takeover offer from Habrok of \$0.07 per share”.
 11. Limited material was provided by Alto to establish that:
 - (a) Alto’s directors had considered any internal analysis or external advice in relation to the timing and pricing of the Entitlement Offer or the Recommendation Announcement.
 - (b) Alto had an urgent need for funds that would justify the timing of the Entitlement Offer.
 12. Alto’s internal records as provided to the Panel do not adequately establish that its directors had appropriate regard to the matters set out in the Recommendation Announcement in reaching their decision to recommend rejection of the Habrok bid (including the factors set out in paragraphs 5(a) to (c) above). Rather, Alto’s internal

²⁹ See Alto’s ASX Announcement from 1 May 2020 – Supplementary Target’s Statement

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records suggest that the pricing of the Entitlement Offer was an important factor upon which the directors determined to recommend rejection of the Habrok bid.

13. The Panel considers that:
- (a) in light of paragraphs 11 and 12 above, the reasons provided in the Recommendation Announcement are misleading or have the potential to mislead Alto shareholders
 - (b) the Recommendation Announcement did not adequately explain why the Alto directors had previously recommended the Goldsea bid (which was at an offer price below the Habrok bid and subject to conditions)
 - (c) the Shareholder Intention Statements (as presented in Alto's ASX announcements from 15 and 16 July 2020) are misleading or have the potential to mislead Alto shareholders in that they do not disclose that certain of the shareholders who have provided Shareholder Intention Statements are related to Alto directors and
 - (d) the timing and pricing of the Entitlement Offer in conjunction with the timing of the Recommendation Announcement:
 - (i) were in part designed as a defensive tactic in response to the Habrok bid
 - (ii) required Alto shareholders to decide whether to take up the Entitlement Offer before being given adequate information to assess the Habrok bid and
 - (iii) has adversely affected the prospects of the Habrok bid succeeding.

EFFECT

14. By reason of the information deficiencies in the Recommendation Announcement and the Shareholder Intention Statements, Alto shareholders did not have sufficient information to make an informed assessment of the undervalue statement and the merits of the Habrok bid, such that the market for control of Alto shares was not taking place in an efficient, competitive and informed market.
15. The Recommendation Announcement and the Entitlement Offer in combination had an effect which may contribute to a proposed acquisition by Habrok not proceeding and is contrary to an efficient, competitive and informed market.

CONCLUSION

16. It appears to the Panel that the circumstances are unacceptable circumstances:
- (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:

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- (i) the control, or potential control, of Alto or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Alto
- (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602.

17. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Alto.

Tania Mattei
Counsel
with authority of Paula Dwyer
President of the sitting Panel
Dated 19 August 2020



Australian Government

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Annexure C

**CORPORATIONS ACT
SECTION 657D
ORDERS**

ALTO METALS LIMITED

The Panel made a declaration of unacceptable circumstances on 19 August 2020.

THE PANEL ORDERS

Entitlement Offer

1. Alto must immediately take all action necessary to terminate the Entitlement Offer.
2. Alto must return all received subscription monies received under the Entitlement Offer and not process any applications under the Entitlement Offer and must not issue or allot any new shares under the Entitlement Offer.
3. Alto must not:
 - (a) announce the terms of any new capital raising or the indication of any Alto shareholder support for any new capital raising or
 - (b) request or accept any commitments from Alto shareholders to participate in a new capital raising

within 2 weeks following the date of dispatch of the Supplementary Statement.

Shareholder Intention Statements

4. Alto shareholders (other than Windsong Valley Pty Ltd (and Marymount Pty Ltd) and Sinotech (Hong Kong) Corporation Limited) who have provided a Shareholder Intention Statement have the right to withdraw their Shareholder Intention Statement.
5. Alto must notify Alto shareholders of their withdrawal rights under order 4 as soon as practicable following the date of these orders.

Supplementary Statement

6. Alto must dispatch a supplementary target's statement (**Supplementary Statement**) to Alto shareholders within 3 business days after the Panel has approved the draft Supplementary Statement under order 7 which will include:
 - (a) details of the relationship (if any) between the Alto shareholders who have provided a Shareholder Intention Statement and the Alto directors and

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(b) an explanation of the effect of the Declaration and these orders.

7. Alto must provide the Panel with a draft Supplementary Statement within 2 business days from the date of these orders.

Other

8. In these orders, the following terms apply:

Alto	Alto Metals Limited
Declaration	The declaration of unacceptable circumstances made by the Panel in relation to the affairs of Alto on 19 August 2020
Entitlement Offer	Alto's proposed 1 for 4 accelerated pro-rata non-renounceable entitlement offer of \$0.07 to raise approximately \$5.1 million announced on 13 July 2020
Habrok	Habrok (Alto) Pty Ltd
Habrok offer	Habrok's unconditional all-cash off-market takeover bid for 100% of the ordinary shares and options in Alto for 6.6 cents per share announced on 22 May 2020
Shareholder Intention Statement	The statements of intention of certain Alto shareholders that they do not intend to accept into the Habrok offer, as set out in Alto's ASX announcements from 15 and 16 July 2020
Supplementary Statement	has the meaning given in order 6
date of these orders	19 August 2020

Tania Mattei
Counsel
with authority of Paula Dwyer
President of the sitting Panel
Dated 19 August 2020